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PP v. ARTUR PEEK & ORS

COURT OF APPEAL, PUTRAJAYA
VAZEER ALAM MYDIN MEERA JCA
AZMI ARIFFIN JCA
SM KOMATHY SUPPIAH JCA
B [CRIMINAL APPLICATION NO: W-05(LB)-78-03-2023]
8 MAY 2024

Abstract – *Once a person facing a drug-trafficking charge, a very serious offence that carries the death penalty, is out of jurisdiction, the continuation of the trial or appeal would be a waste of public funds and judicial resources. The better alternative would be to balance the interest of the individuals as against the State and have the person detained under s. 56A of the Courts of Judicature Act 1964 and, if necessary, admit to bail with appropriate conditions to secure his attendance at the hearing of the appeal.*

CRIMINAL PROCEDURE: *Prosecution – Application for order of arrest and remand against accused persons – Accused persons foreign nationals jointly charged at High Court for trafficking in dangerous drugs – High Court acquitted and discharged accused persons – Prosecution's appeal pending at Court of Appeal – Whether accused persons ought to be arrested and remanded until disposal of pending appeal – Courts of Judicature Act 1964, s. 56A*

The respondents, who were all foreign nationals, were jointly charged at the High Court with three counts of trafficking in dangerous drugs, under s. 39B of the Dangerous Drugs Act 1952 ('DDA') and one count under s. 9(1) of the Poisons Act 1952. The High Court, having found that the applicant ('prosecution') had failed to establish a *prima facie* case, acquitted and discharged the respondent. The prosecution's appeal against the said decision, to the Court of Appeal, was still pending. In the present application, the prosecution sought an order of arrest and remand against the respondents, pursuant to s. 56A of the Courts of Judicature Act 1964 ('CJA'), on the grounds that if the respondents were deported to their countries of origin before the appeal was heard and disposed, they would be beyond the court's jurisdiction and the appeal would be rendered academic and nugatory.

Held (allowing application)
Per Vazeer Alam Mydin Meera JCA delivering the judgment of the court:

(1) The order to arrest and remand the respondents in prison, under s. 56A of the CJA, until the disposal of the pending appeal was granted. It was further ordered that in the event any of the respondents were able to produce, to the satisfaction of the court, a valid travel document or

passport, together with a valid visa/permit to stay in Malaysia, he would be allowed bail on the following conditions, that: (i) the bail amount shall be RM70,000 with two sureties; (ii) the travel document or passport is surrendered to the court; and (iii) the respondent reports to the police station nearest to him on the first working day of each month. (para 9)

(2) If the respondents, who were foreign nationals, were to leave the jurisdiction of this court, then the probability of the appeal being rendered nugatory would be heightened. The respondents were all charged with offences of trafficking in dangerous drugs under s. 39B(2) of the DDA that carried the death penalty. Needless to say, it was a very serious offence. If the respondents were to leave the country, and even if the appeal were to proceed in the absence of the respondents, their subsequent extradition to Malaysia would be wrought with difficulty and, in some cases, would be an impossibility. (para 11)

(3) An appeal is a continuation of a trial. Consequently, upon the lodgement of an appeal to this court, against an order of acquittal by the High Court, the criminal proceeding against the respondents was revived and continued. Hence, the power to remand the respondents and/or admit them to bail pending the disposal of the applicant's appeal by this court was necessary for an effective exercise of the court's jurisdiction over the offence allegedly committed by the respondent. (para 15)

Case(s) referred to:
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Balasingham v. PP [1959] CLJU 8; [1959] 1 LNS 8 HC ***(refd)***
PP v. Bird Dominic Jude [2013] 8 CLJ 471 CA ***(refd)***
PP v. Norman Ismail [2008] 5 CLJ 261 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 56A
Criminal Procedure Code, s. 425A
Dangerous Drugs Act 1952, s. 39B(2)
Federal Constitution, art. 8
Poisons Act 1952, s. 9(1)

For the appellant - Sarulatha; DPP
For the respondent - Affifudin Hafifi & Amirrul Jamaluddin; M/s Salehuddin Saidin & Assocs
Anwar Ezzad Zainal; M/s Shahra, Ezzad & Izyan
Fahri Azzat & Ivan Teng; M/s Fahri, Azzat & Co

Reported by Najib Tamby

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JUDGMENT

Vazeer Alam Mydin Meera JCA:

[1] This is an application by the Public Prosecutor for an order of remand against the respondents pursuant to s. 56A of the Courts of Judicature Act 1964 ("CJA").
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[2] The respondents were jointly charged with three counts of trafficking in dangerous drugs under s. 39B of the Dangerous Drugs Act 1952 and one count under s. 9(1) of Poisons Act 1952. The respondents pleaded not guilty to the charges and were tried. At the close of the prosecution's case, the High
C Court found that the prosecution had failed to establish a *prima facie* case, and accordingly, the respondents were acquitted and discharged. The applicant appealed that decision to the Court of Appeal and the appeal is pending.

[3] The respondents are all foreign nationals where the first respondent, Artur Peek is a Russian citizen, while the second and third respondent,
D Ajithkumar and Prem Dass respectively, are Indian citizens. They were being held at the Bukit Jalil Immigration Depot pending deportation.

[4] The Public Prosecutor then filed this application to seek an order of arrest and remand against all the respondents under s. 56A of the CJA primary on grounds that if the respondents were deported to their countries
E of origin before the appeal is heard and disposed, they would be beyond the court's jurisdiction and the appeal would be rendered academic and nugatory. The applicant further contended that the appeal has merit and there was a good chance of success.

F **[5]** On 7 April 2023, an *ex parte* order for arrest and remand was granted by this court against all the respondents. A date for the *inter partes* hearing was then fixed. An affidavit was filed by Imelda Puyang Ajeng, a Malaysian, who was the lawful wife of the first respondent stating her willingness to stand as bailor and surety for the first respondent. The third respondent had, *vide* his counsel, filed written submission resisting the application. The
G counsel for the second respondent submitted orally.

[6] At the *inter partes* hearing, learned counsel for the third respondent in opposing the application submitted that:

H (i) section 56A of the CJA does not distinguish between citizens and foreigners, it merely makes reference generally to accused persons, and as such, the fact that the respondents are foreigners has no bearing on the Public Prosecutor's application;

I (ii) the respondents are entitled to equal treatment under the law pursuant to art. 8 of the Federal Constitution and that any detention of the third respondent pending disposal of the appeal on grounds that he is a foreigner would be a breach of this constitutional right;

(iii) the appeal would not be rendered nugatory or struck out by reason of the third respondent leaving the country as the prosecution can still proceed with the appeal by virtue of s. 425A of the Criminal Procedure Code; and

(iv) the contention that the appeal has merit, even if true, has no bearing on this application as s. 56A of the CJA does not make reference to the merits of the appeal as a consideration.

[7] Further, and/or in the alternative, learned counsel for the third respondent submitted that if this court was minded to allow the application to remand the third respondent, s. 56A of the CJA allows the exercise of the court's discretion to admit the third respondent to bail, and prayed for bail to be granted in such circumstance.

[8] Learned counsels respectively for the first and second respondents submitted that if the court was minded to allow the applicant's application, then their respective clients ought to be admitted to bail with appropriate conditions in order to balance the interest of the state as against that of the interest of their clients who had been acquitted of the charges by the trial court.

[9] Having considered the submissions, we unanimous allowed the application by the Public Prosecutor and granted the order to arrest and remand the respondents in prison under s. 56A of the CJA until disposal of the pending appeal and further ordered that in the event any of the respondents were able to produce to the satisfaction of this court a valid travel document or passport together with a valid visa/permit to stay in Malaysia, he would will be allowed bail on the following conditions:

(i) that the bail amount shall be RM70,000 with two sureties;

(ii) that the travel document or passport is surrendered to the court; and

(iii) that the respondent reports to the police station nearest to him on the first working day of each month.

[10] The Court of Appeal in *PP v. Bird Dominic Jude* [2013] 8 CLJ 471; [2013] 6 MLJ 785 had laid down the principles for the court's exercise of its discretion under s. 56A of the CJA, and we quote:

> [37] As we have explained earlier, the discretion of the court in making use of the power under s. 56A, even though wide, is to be exercised judicially. Whether in the circumstances of the case, the attendance of the accused person at the hearing of the prosecution's appeal can best be secured by committing him to prison or admitting him to bail, is a matter which rests solely in the discretion of the court. It is appropriate at this juncture, without laying down any inflexible rule, we set out the factors that this court should consider in exercising itsjurisdiction under s. 56A

of the CJA. The list of the considerations is not exhaustive and there may be other considerations as well which may emerge from the facts and circumstances of each case. Generally speaking, this court would take into account the following:

(a) the order made must be objectively fair and proportionate;

(b) the discretion should never be exercised arbitrarily;

(c) the discretionary power should be sparingly invoked;

(d) the nature and seriousness of the offence;

(e) the accused person has been proven not guilty and has been acquitted; there is a presumption of innocence in favour of the accused person;

(f) it is in the interest of the public and the state to preserve the integrity of the prosecution's appeal;

(g) the absence or non-attendance of the accused person at the hearing of the prosecution's appeal will render the appeal nugatory;

(h) the length of time which is likely to take for the appeal to be heard;

(i) if bail is admitted, whether the security and conditions imposed will ensure the attendance of the accused person;

(j) the probability of the accused person absconding, if released on bail;

(k) a balance has to be struck between the right to individual liberty and the interest of the public and state; and

(l) where the issue relates to the safety and security of the state much weight will be given to the application of the public prosecutor.

[11] In coming to our decision, we had taken into account the above factors. We were mindful of the fact that if the respondents, who are foreign nationals, were to leave the jurisdiction of this court, then the probability of the appeal being rendered nugatory is heightened. The respondents were all charged with offences of trafficking in dangerous drugs under s. 39B(2) of the Dangerous Drugs Act that carries the death penalty. Needless to say, it is a very serious offence. Now, if respondents were to leave the country and even if the appeal were to proceed in the absence of the respondents as is permitted by law, their subsequent extradition to Malaysia would be wrought with difficulty and in some cases it would be an impossibility. We have taken judicial notice of the case of *Sirul Azhar*, where the Public Prosecutor's appeal proceeded in the absence of the accused/respondent who were then convicted by the Federal Court, the sentence could not be executed as he had fled to Australia and attempts to extradite were not fruitful because Australian law forbade any person facing the death penalty to be extradited. Obviously, once a person facing a drug-trafficking charge is out of jurisdiction, then the continuation of the trial or appeal would be a waste of public funds and judicial resources. The better alternative would be to

balance the interest of the individual as against the state, and have the person detained under s. 56A of the CJA, and if necessary, admit him to bail with appropriate conditions to secure his attendance at the hearing of the appeal.

[12] As to the alleged infringement of the respondents' rights under art. 8 of the Federal Constitution on equal treatment before the law raised by learned counsel for the third respondent, a similar argument was comprehensively dealt with by the Court of Appeal in *PP v. Bird Dominic Jude* [2013] 8 CLJ 471; [2013] 6 MLJ 785, where after considering the various provisions of the law, the court stated unequivocally that:

> ... there can be no doubt that s. 56A does not violate arts. 5(1) and 8(1) of the FC. By virtue of s. 56A read with art. 121(1B) of the FC, this court, pending disposal of an appeal against an order of acquittal, is competent and empowered to cause an accused person to be arrested and committed to prison, or admit him to bail. This attempt by the respondent to strike down the judicial powers of this court, as encapsulated in s. 56A of the CJA, is without any merit and must inevitably fail. Section 56A of the CJA is a valid and binding law.

[13] In this regard, it would be apposite to refer to another judgment of this court in *PP v. Norman Ismail* [2008] 5 CLJ 261; [2008] 4 MLJ 830, where the purpose of s. 56A of the CJA was considered:

> The consideration of the order for remand or bail requires the construction of the second limb of s. 56A. This court has to exercise the discretion judicially and according to established judicial principles, having regard to all the facts and circumstances prevailing in each particular case.
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> Although the exercise of discretion by this court is not unprincipled, it is impossible and impracticable to set out a rigid formula in this regard.
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> As a general rule, when an accused has been acquitted by the High Court, he remains a free man and every effort should be made to give effect to the order.
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> However, this general rule must now be read in conjunction with the provisions of s. 56A as alluded to above. It is the duty of this court to ascertain the intention of Parliament as expressed in s. 56A.
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> Section 17A of the Interpretation Acts 1948 and 1967 provides as follows:
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> > In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred.
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> The purpose of enacting s. 56A may be discerned from the explanatory statement to the Courts of Judicature Amendments (No 2) Act 1975 Bill. The relevant portion of this explanatory statement reads as follows:

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> This Bill seeks to amend the Courts of Judicature Act, 1964 ... for the following purposes:
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> (a) ...
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> (b) to empower the Public Prosecutor to appeal to the Federal Court against any decision made by the High Court in the exercise of its
B criminal jurisdiction at first instance.
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> The purpose of s. 56A is clearly to empower the prosecution to appeal against an acquittal ordered by the High Court. By way of corollary, it is intended to preserve the integrity of the prosecution's appeal.
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> The amendment expressed in s. 56A serves the specific purpose of
C ensuring that the right of the prosecution to appeal is not rendered academic or nugatory as a result of the absence or non-attendance of an accused who has been acquitted by the High Court. It is intended to facilitate a full hearing of the appeal on its merits so that justice is not only done to the accused but also to the public and the State.
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D It needs to be noted that an appeal is a continuation of a trial; see *eg*, *Balasingham v. Public Prosecutor* [1959] 1 MLJ 193 (HC) per Ismail Khan J (later CJ (Borneo).
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> The integrity of the prosecution's appeal can only be preserved if the accused is placed in such a position as to conduce to the hearing and
E determination of the appeal in due course, which can never be realised in the absence or non-attendance of the accused. Hence, s. 56A must be construed so as to promote that purpose.

[14] Hence, having regard to these cases, which we are bound to follow by virtue of the doctrine of *stare decisis*, we did not find merit in the arguments
F raised by learned counsel for the third respondent. Wherefore, we allowed the application by the applicant for the order of arrest and remand under s. 56A of the CJA with the proviso for the grant of conditional bail.

[15] As noted by this court in *PP v. Bird Dominic Jude*, in the context of the present case, it is pertinent to note that an appeal is a continuation of a trial
G (see *Balasingham v. PP* [1959] CLJU 8; [1959] 1 LNS 8; [1959] MLJ 193, *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800; [2009] 2 MLJ 613). Consequently, upon the lodgement of an appeal to this court against an order of acquittal by the High Court the criminal proceeding against the respondents revives and continues. Hence, the power to remand the respondents and/or admit
H them to bail pending the disposal of the applicant's appeal by this court is necessary for an effective exercise of the court's jurisdiction over the offence allegedly committed by the respondent.

Orders accordingly.

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